Supreme Court, U.S.
FILED

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IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

Jerry L. Hoagland, Bill Lowry, Tim Lowry,
William J. Brockman, Ted S. Blackstock,
Michael F. Hanley IV, Richard Brandau, and
Paul Nettleton,

Petitioners

v. Case No._____

United States of America,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE IDAHO SUPREME COURT

(U.S. v. State of Idaho, et. al, 959 P.2d 449 (Idaho 1998))

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I

QUESTIONS PRESENTED

Did the Idaho Supreme Court incorrectly interpret and apply federal law by ruling that a 1926 Executive Order entitled "Public Water Reserve No. 107" constituted a reservation of water in the name of the United States rather simply a reservation of land surrounding public water holes?

Did the Idaho Supreme Court incorrectly interpret and apply federal law by ruling that the federal statutes, Stock Raising Homestead Act, ch. 9, 39 Stat. 862, and the Picket Act, ch. 421, 36 Stat. 847, authorized the President to reserve water rather than withdraw land?

Is the Idaho Supreme Court ruling inconsistent with decisions of this Court regarding the parameters of the federal reserved water doctrine?

Is the Idaho Supreme Court ruling inconsistent with decisions of this Court regarding U.S. Congressional deference to state sovereignty as to title to water and the administration of water rights?

Does the Idaho Supreme Court's ruling create federal law by creating a right to administer water use in a federal regulatory agency outside the parameters of any act of Congress or any provision of the United States Constitution?

II

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption to this Petition for Writ of Certiorari, other parties were the State of Idaho, J.R. Simplot Co., Lemhi Irrigation Co., Dave Nelson, Lola Coates, San Felipe Ranch, Harry R. Bass, Thomas Ballman Hook, R.J. Smith, Wiley F. Smith, Mitchell D. Sorenson, Robert Thomas, Young Harvey Walker. All these parties, together with the Petitioners named in the caption, participated as respondents in the Idaho Supreme Court proceedings.

The State of Idaho has also filed a Petition for Writ of Certiorari to be directed to the Idaho Supreme Court in this case.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Statutory Provisions Involved	1
Executive Order Involved	2
Statement of the Case	3
Reasons for Granting Petition	7
Conclusion	16

TABLE OF AUTHORITIES

Cases:

In re Big Horn River, 899 P.2d 848 (Wyoming 1995)
Jennison v. Kirk, 98 U.S. 453 (1879)
Montana v. United States, 450 U.S. 544 (1981)
Oregon v. Corvallis Land and Gravel Co., 429 U.S. 363 (1977)
United States v. New Mexico, 438 U.S. 696 (1978)

Statutes and Legislative Materials:

Federal Land Policy Management Act of 1976, 90 Stat. 2743 (codified at 43 U.S.C. Section 1701 et seq.)
H.R. Rep. No. 36, 64th Congress, lst Session 18 (1916)
Idaho Admission Act, Volume 1, Idaho Code pp.
Mining Act of 1866, ch. 262, 14 Stat. 251
Pickett Act of 1910, ch. 421, 36 Stat. 847
Stock Raising Homestead Act of 1916, ch. 9, 39 Stat. 862
Taylor Grazing Act of 1934, ch. 865, 48 Stat. 1269

Executive and Administrative materials:

Executive Order "Public Water Reserve No. 107"
Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, M-36914, 86 Interior Dec. 553 (1979) State of Utah, 45 I.D. 551 (1916)

CITATIONS OF OPINIONS BELOW

The opinion of the Idaho Supreme Court which gives rise to the filing of this Petition for Writ of Certiorari is reported at ____Idaho___, 959 P.2d 449 (Id. 1998), and is produced in the Appendix at Appendix I.

Petitioners in this case filed a petition for rehearing with the Idaho Supreme Court, but the Court denied that Petition without discussion. The Order denying rehearing, which made the judgment of the Idaho Supreme Court final as of July 29, 1998 is produced at Appendix 28.

The decision of the District Court, which is the Court responsible for processing the Snake River Basin Adjudication initiated for the purpose of adjudicating claims to water in the Snake River Basin in Idaho, which was reversed by the Idaho Supreme Court is unreported but is produced at Appendix 13.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a). The judgment of the Idaho Supreme Court to which the Petition for Writ of Certiorari is directed was entered on July 29, 1998, so the Petition is timely filed.

STATUTORY PROVISIONS INVOLVED

Pickett Act of 1910 (also known as General Withdrawal Act), ch. 421, 36 Stat. 847, 43 U.S.C. Section 141 (repealed by the Federal Land Policy Management Act in 1976), provided, in relevant part:

> Section 1. That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation,

> classification of lands, or other public purposes to be specified in the the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

Stock Raising Homestead Act of 1916, ch. 9, 39 Stat. 862, 43 U.S.C. Section 300 (repealed by Federal Land Policy Management Act in 1976), provided, in pertinent part:

> Section 10. That lands containing water holes or other bodies of water needed or used by the public for watering purposes shall not be designated under this Act but may be reserved under the provisions of the Act of June twenty-fifth, nineteen hundred and ten [the Pickett Act, supra] and such lands heretofore or hereafter reserved shall, while so reserved, be kept and held open to the public use for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe..."

EXECUTIVE ORDER INVOLV ED

Public Water Reserve No. 107, issued by President Coolidge on April 17, 1926, provides as follows:

> Under and pursuant to the provisions of the act of Congress June 25, 1910 (36 Stat. 846), entitled "An act to authorize the President of the United States to make withdrawals of public lands in certain cases" as amended by act of Congress approved August 24, 1912(37 Stat.497), it is hereby ordered that every smallest legal subdivision of the public land survey which is vacant unappropriated unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land be, and the same is hereby withdrawn from settlement, location, sale or entry and reserved for public use in

accordance with provisions of sec. 10 of the act of December 29, 1916 (39 Stat. 862) and in aid of pending legislation.

STATEMENT OF THE CASE

Over a decade ago, in 1987, the Idaho legislature authorized the initiation of the Snake River Basin Adjudication for the purpose of adjudicating all water rights in the basin. The United States was joined as a party in accordance with 43 U.S.C. Section 666.

This Adjudication includes 87% of the geographic area of the State of Idaho, and impacts the entire state and every agricultural and natural resource related operation in the State.

The Idaho legislature established special statutory procedures for the processing of more than 170,000 claimed water rights in the basin. Claimants were required to file a separate notice of claim for each water right. The Idaho Supreme Court delegated to the District Court the authority to establish procedures for processing the claims.

Your Petitioners are individuals who have filed claims for stockwater and irrigation water in this Adjudication. Their claims are based upon prior appropriation of water for beneficial use. They all are ranchers who raise livestock dependent upon the sources of stockwater which exist throughout the Basin. Most of the Petitioners graze their livestock on the federal rangelands. A large number of the individual claims filed in the Adjudication involve ranchers who graze the federal rangelands or forest lands. All are dependent upon continued use of their claimed water rights for their livelihood.

The United States filed approximately 50,000 claims, and over 11,000 of them were claims of federal reserved water rights based upon an Executive Order issued in 1926, an Executive Order entitled "Public Water Reserve 107" (hereinafter PWR 107). The Executive Order based its provisions on the authority of the Pickett Act passed by Congress on June 25, 1910, and the Stock Raising

Homestead Act passed by Congress on December 29, 1916. The nature of the use of the water referred to by the U.S. claims is that of stockwater for livestock which graze the federal range lands. The U.S. claims are inconsistent with the claims filed by the individuals who are Petitioners in this case.

One of the procedural provisions established by the District Court was to designate certain issues as "Basin-wide issues" because they impacted a wide spectrum of claimants throughout the basin. Upon motion the District Court designated Basin Wide Issue No. 9, stated as follows: "Whether Public Water Reserve 107 is a valid basis for a federal reserved water right."

The Petitioners, and other objectors to the U.S. claims, contended that PWR 107 was not a reservation of water, but rather was a reservation of land surrounding water holes and springs on the federal lands---such reservation of land occurring as a means of protecting the use of the water by grazers such as your Petitioners. They contended that PWR 107 contained neither an express nor implied reservation of water. In support of their contentions, they relied upon the provisions of the Pickett Act and the Stock Raising Homestead Act, as well as the parameters of the federal reserved water doctrine enunciated by this Court's prior decisions. They also contended that to hold that PWR 107 did in fact create a federal reservation of water would be inconsistent with prior Congressional Acts and decisions of this Court deferring sovereignty over water to the states and to state doctrines such as prior appropriation for a beneficial use.

District Judge Hurlburt, who has presided over the Adjudication from its inception, ruled that PWR 107 was not a valid basis for the U.S. claim of reserved water rights. The District Judge concluded that PWR 107's "express purpose was to reserve the land immediately surrounding water sources to ensure that water would remain available for public use and appropriation." Appendix 17. The District Court further explained:

> PWR 107 was not an express appropriation of water

> for use by the United States government. The express intention of PWR 107 was to protect the availability of water sources for settlement or homesteading by members of the public who could take public land and put it to private use. Concomitantly, the omesteaders would appropriate the water so protected and place it to private use. In this manner, PWR 107 advanced federal settlement policy. The use of the water in protected sources by the federal government was neither contemplated by Congress nor was it necessary to carry out the express purpose of PWR 107 reservations.

Appendix 17.

The District Court also concluded that to hold that PWR 107 created a reserved water right for the U.S. "would effectively shift control over the appropriation of non-navigable waters from the state to the federal government." Appendix 19. Elaborating, Judge Hurlburt stated:

> Accepting that PWR 107 impliedly reserved water in addition expressly reserving land would constitute a complete reallocation of federal and state sovereignty with respect to the appropriation of non-navigable waters ...The practical effect of the United States' position would be to remove water within PWR 107 reserves from appropriation under state law. Water within a PWR 107 reserve would then be allocated by the United States.

Appendix 19. The Court pointed out that such a holding transferring authority to the U.S. to allocate state water is inconsistent with "Western Water Law" in which the states are accorded control of the appropriation of non-navigable waters." Id.

The Idaho Supreme Court reviewed the case on an appeal filed by the U.S. The Court reversed the District Court decision,

concluding that PWR 107 "evidences an express intention by Congress that reserves a water right in the United States". Appendix 9. The Court does not explain how the Presidential Executive Order issued in 1926 manages to "express intention by Congress" contained in prior Acts related only to reservation of lands, with no mention of reserving water rights.

The Idaho Supreme Court also concluded that "Without the reserved water right for such springs and water holes the purpose of PWR 107 would be entirely defeated because Taylor Grazing Act permittees would not have water needed for stockwatering purposes." Appendix 10. The Court ignored the opinion of the Interior Department expressed in 1916, cited by District Judge Hurlburt, that a member of the public such as one of the Petitioners could, under state appropriations laws, appropriate water from water in a federal land reserve. With regard to the impact on Taylor Grazing permittees the Court ignored two important factors: (1) the Mining Act of 1866 preserved water rights gained by prior appropriation for a beneficial use and the right to access that water, and that preservation would have protected those rights for Taylor Grazing permittees, and (2) following adjudication of grazing preferences pursuant to Congressional mandate contained in the Taylor Grazing Act passed in 1934 the permittee was guaranteed access by the preference which was based upon availability of water and private land sufficient to sustain the ranching operation.

In their petition for rehearing, the Petitioners drew to the Idaho Supreme Court's attention the fact that the decision was contrary to the specific language of the Pickett Act and Stock Raising Homestead Act and the legislative history related to those acts, to the prior decisions of this Court, and would have the result of creating federal law of administration of water where none previously existed. After nearly three months, the Idaho Supreme Court denied the Petition for Rehearing without comment.

REASONS FOR GRANTING THE PETITION

I. THE IDAHO SUPREME COURT MISAPPLIED FEDERAL LAW: PWR 107 DOES NOT EFFECT A RESERVATION OF WATER, BUT IS RATHER A RESERVATION OF LAND.

The Idaho Supreme Court claims that it considered the "plain and ordinary words of the enabling statutes and executive order underlying PWR 107" in deciding that PWR evidenced "an express intention by Congress that reserves a water right in the United States." But, the "plain and ordinary words" of the enabling statutes---the Pickett Act and the Stock Raising Homestead Act---did not authorize the President to reserve water. The "plain and ordinary words" of PWR 107 do not reserve water. And, the "intention" of Congress as evidenced by the legislative history of the Acts, as well as the content of prior Congressional Acts preserving vested water rights in private individuals, does not support any inference that Congress intended that the President reserve water rights.

A. PWR 107 DID NOT EXPRESSLY RESERVE WATER.

The first flaw in the Idaho Supreme Court's decision is found on the face of the Executive Order itself. It does not profess to reserve water---it reserves only land.

The Order withdrew "from settlement, location, sale or entry" land described as "every smallest legal subdivision of the public land survey which is vacant unappropriated unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole". This language is the language of "land" reservation, related specifically to legal subdivision of the "land survey", and to "all land" located within one quarter of a mile of springs and water holes on the "unsurveyed" public domain. If this language appeared in a deed, any court would have no trouble identifying it as language related to "land", not "water".

The Order reserved only land, by its own terms. It did not reserve the water. It was so written so that land could be reserved in order to protect access to the water which was used by the range settlers who had by 1926 been watering stock at the springs and water holes for half a century. Those settlers had laid claim to the use of the water at these sites by prior appropriation for the beneficial use of stockwatering. In 1926, as now, the United States government did not own livestock which it watered at these water sites. It made no beneficial use of the stockwater at these sites. Rather, the beneficial use of the water was made by the range settlers who had been invited to the west by the U.S. government. So, how could the President have even justified a reservation of the water at these sites? The government was interested in preserving the use of the water for the range settlers who watered their stock at the sites. So, they reserved the land around the water sites in order to preserve access for the settlers to the water.

Congress had not authorized the President to reserve this stockwater. The Stock Raising Homestead Act, cited as an authority base by PWR 107, provided that "Lands containing water holes or other bodies of water needed or used by the public for watering purposes...may be reserved..." There is nothing in this language which would authorize reservation of the stockwater for the government which did not water stock. The statute authorized reservation of land, not water.

Previously, in the Pickett Act of 1910, cited by the Stock Raising Homestead Act, Congress had authorized the President to "withdraw from settlement, location, sale or entry any of the public lands of the United States..." Congress did not authorize the reservation of stock water, but of the "public lands". The language of this Act, as the language of PWR 107 is the language of "land" reservation. The Congressional authorization, and the withdrawal itself, refer to withdrawing from "settlement, location, sale or entry." These are words related to the settlement of, locating on, sale of, or entry on to land.

The legislative history of the 1916 Stock Raising Homestead

Act makes it evident that the clear language of "land" withdrawal used by the Congress was intended to mean exactly what it says--- the reservation was to be of "land". A House Report stated that the Act authorizes the executive to "withhold land from entry so that there may be no interference with stockmen in the movement of their stock from the winter to the summer ranges in the forest reserves or to other places on the public domain." The Report stated that the provision for such withdrawal "is also in the interest of the stockmen". It would certainly not have been in the "interest of the stockmen" to have the U.S. reserve the right to use the water in the springs and water holes which had already been appropriated by the stockmen. See H.R. Rep. No. 36, 64th Congress, 1st Session 18 (1916).

The President must be presumed to have been aware of this Congressional intent, and of the clear language of the Pickett and Stock Raising Homestead Acts. The President knew that the authorization for withdrawal was limited to "land", thus PWR 107 in fact withdrew land, not water.

The Department of Interior recognized from the beginning that PWR 107 was a land reservation, not a water reservation Order. In State of Utah, 45 I.D. 551 (1916), an Assistant Secretary of the Interior wrote that the "withdrawal of these lands" did not prevent an individual from appropriating water under the state laws of Utah "at any time". 45 I.D. at 554. If the Executive Department in charge of the public range lands in 1916 believed that the Executive Order would be a reservation of water, it could not have recognized the right of an individual to appropriate that water "at any time", because reserved water is not subject to appropriation. Obviously, the Interior Department considered the withdrawal to be a "land" withdrawal.

In the State of Utah decision, the Assistant Secretary also said that while an individual could appropriate water, he could not "fence the land, or...erect structures thereon which would prevent the public from continued free access to all parts of it..."

This decision constitutes regulatory agency recognition that the Executive Order was designed to implement the Congressional intent stated in the Pickett and Stock Raising Homestead Acts that settlement of the west be encouraged by ensuring that large tracts of land surrounding water sites could not be monopolized so as to prevent access to stockwater by the range settlers who relied on those stockwater sites. PWR 107 implemented the Congressional intent by preventing such monopolization. By withdrawing land surrounding the water sites from "settlement, location, sale or entry", the Order prevented homesteaders from denying access to stockwater by stockmen.

Even as late as 1979, the Solicitor of the Department of Interior, had to acknowledge that PWR 107 protected the preservation of public use of the water sites by using "the most traditional and most effective way of preserving resources on the public domain, i.e., restricting entry by withdrawing land..." See Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation, and the Bureau of Land Management, M-36914, 86 Interior Dec. 553 (1979).

The "plain and ordinary" words used in PWR 107 withdrew and reserved only land, in order to secure access to water. The "plain and ordinary" words used by Congress in the Pickett and Stock Raising Homestead Acts authorized only withdrawal of land. The "plain and ordinary" words used by Congress in stating the intent of the Stock Raising Homestead Act made it clear that only withdrawal of land was authorized. The contemporary and subsequent statements by the Interior Department makes it clear that the Department understood those "plain and ordinary" words of land withdrawal. The District Court in Idaho reviewed all those "plain and ordinary" words and understood them. But, the Idaho Supreme Court issued its decision which is contrary to such "plain and ordinary" words, and did not even bother to express its reason for discounting the words of the Order, and the words of Congress.

By discounting the words of Congress, the Idaho Supreme Court has rendered a decision which is in fact a misconstruction and

misapplication of federal law. It did not render a decision based upon state law, but upon federal law which it misinterpreted, misconstrued and misapplied. The only relief left to these Petitioners who depend upon stockwater on the federal lands is for this Court to grant certiorari in order to rectify the misapplication of federal law.

B. PWR 107 DOES NOT CREATE AN IMPLIED WATER RESERVATION.

When the Idaho Supreme Court determined that PWR 107 impliedly reserved water to acocmplish the purpose of the withdrawal, it misconstrued and misapplied federal law as to reserved water rights as explained by decisions of this Court.

When there is no express reservation of water, there is no implied reservation of water unless the primary purpose of the reservation of land will be "entirely defeated" without reservation of water. United States v. New Mexico, 438 U.S. 696 at 700.

As pointed out to the Idaho Court, and as pointed out in this Petition and in the Petition being filed in this case by the State of Idaho, the purpose of PWR 107 was to avoid monopolization of the lands surrounding water sites so that public use of the water by stockmen could not be prevented. The purpose of the withdrawal was therefore served by the withdrawal of the land. Once the land was withdrawn from "settlement, location, sale or entry", no one could restrict access to the stockwater. The Department of Interior decision in 1979 recognizing that restriction of entry to the land surrounding the water was the most effective way to preserve use of the water evidences administrative recognition that the purpose of the Executive Order was served by withdrawal of the land. So, reservation of the water was not necessary to implement the purpose of the Order. Certainly it cannot be said that the purpose of preventing monopolization of the land would be "entirely defeated" without a reservation of water. U.S. v. New Mexico, supra.

II. SUBSEQUENT EVENTS TO 1926 HAVE TERMINATED

ANY NEED FOR EVEN THE RESERVATION OF LAND RESULTING FROM PWR 107'S WITHDRAWAL OF LAND

Events subsequent to issuance of PWR 107 would have terminated the need for reservation of water even assuming arguendo that reservation of water was necessary to accomplish the purpose of PWR 107. When the Congress passed the Taylor Grazing Act it ordered adjudication of grazing preferences and replaced public access and use with preferential access and use rights placed in private individuals through the adjudication process. Subsequently only the holder of an adjudicated grazing preference right could lawfully use the stockwater at specific sites on the federal range lands because only such holders could lawfully graze the federal lands with access to specific water sites. Any member of the public trying to graze the lands and water livestock at those sites other than the permitted preference holder would be guilty of trespass under federal law. So, any purpose of providing for "public use and access" expressed by PWR 107 was, after Taylor Grazing, and is now no longer viable as a base for claimed reservation of water.

When the need or purpose for reservation ends, the reservation ends. In re: Big Horn River, 899 P.2d 848 (Wyoming 1995).

Further, when Congress enacted the Federal Land Policy Management Act in 1976 it conclusively destroyed any contention that a need for reservation of water existed by declaring that the U.S. would retain ownership of the federal lands. Thus, since 1976 the federal lands have not been available for "settlement, location, sale or entry", and any implied need for reservation of land or water under PWR 107 is no longer existent.

The Idaho Supreme Court did not specify a reason for believing that reservation of water was necessary to prevent monopolization of land giving access to water. It did not even discuss the termination of any need for and purpose for the reservation of land stated in PWR 107.

The Court does state that the Federal Land Policy Management Act did not abrogate PWR 107 because of its provision that prior withdrawals and reservations "shall remain in full force and effect." But, the statement misses the entire point regarding the need for a reservation of water to fulfill the purpose of the withdrawal. FLPMA continued the vitality of the Taylor Grazing Act and its placement of the use of the range lands and access to stockwater in private individuals. So, FLPMA mandated retention of ownership of the federal grazing lands, and continued the Taylor Grazing elimination of need for protection of access to stockwater.

The Idaho Court further shows that it either misunderstands, or has simply misapplied, federal law as stated in the Taylor Grazing Act when it states that "Without the reserved water right for such springs and waterholes the purpose of PWR 107 would be entirely defeated because Taylor Grazing Act permittees would not have water needed for stockwatering purposes." That is simply not a true interpretation of the state of the federal law which exists following passage of the Taylor Grazing Act.

Taylor Grazing Act permittees held stockwater rights which had been preserved by the Mining Act of 1866 and subsequent acts of Congress which preserved vested rights previously acquired. The ranchers who had acquired water rights prior to passage of the Taylor Grazing Act were accorded a preference by passage of the Act. When their allotments were adjudicated following passage of the Act, that adjudicated preference guaranteed protection of access to and use of the stockwater located on the federal land which comprised part of their allotment. That guarantee results from the fact that no one but the preference holder can lawfully graze the federal lands supplied by stockwater located on the federal lands.

The Idaho Supreme Court misapplied federal law by enforcing PWR 107 even though subsequent federal statutes terminated any need for the purpose for issuance of PWR 107.

III. THE IDAHO SUPREME COURT HAS ESTABLISHED A RIGHT OF FEDERAL ADMINISTRATION OF ALLOCATION

OF WATER RIGHTS WITHOUT ANY BASE IN FEDERAL LAW.

The Idaho Supreme Court concludes that "the United States has the right to administer such water rights on the public lands managed under the Taylor Grazing Act." Appendix 11-12. No federal statute, no prior decision of this Court, and no provision of the United States Constitution can be cited as a base for such "right" on the part of the United States to "administer" water rights. It is a "right" created from the air, and as announced is inconsistent with a long list of decisions by this Court recognizing that Congress has repeatedly deferred water rights allocation to state sovereignty. It is not within the province of the Idaho Supreme Court to create a "right" and, presumably a corresponding responsibility, of the U.S. government to allocate water rights to private individuals.

In 1889, the Idaho Constitution was adopted and ratified by the people. See I Idaho Code, pp. 6l-69. On July 3, 1890, the Congress enacted the Idaho Admission Act. 26 Stat. 215. Section 1 of the Act provided that Idaho was admitted into the Union on an "equal footing with the original states" and that the constitution ratified by the people of Idaho was "accepted, ratified and confirmed."

This "accepted, ratified and confirmed" Idaho Constitution provided in Article 15, Section 1, that the use of all waters, appropriated and unappropriated, within the state was a "public use" and was "subject to the regulations and control of the state." It also provided in Article 15, section 3 that "the right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied." Volume 1, Idaho Code, p. 313.

So, when Congress admitted Idaho, it also ratified and approved an Idaho constitutional mandate that water rights would be governed by state law, and that all water in the state would be "subject to the regulations and control of the state." The decision of the Idaho Supreme Court has turned this constitutional provision,

approved by the Congress, on its head by turning over to a federal regulatory agency the right to allocate, make regulations for use of and control stockwater rights.

The Congressional commitment to deferring water rights to state sovereignty as evidenced by the Idaho Admission Act was not the only such commitment made by Congress. Congress had already extended such deference by passage of the Mining Act of 1866 in which it acknowledged the existence of water rights established under local customs and law. That Mining Act, according to this Court, extended "the sanction of the United States, the proprietor of the lands, to possessory [water]rights, which had previously rested solely upon...local customs, laws and decisions of the courts" and prevented such rights "from being lost on a sale of the lands." Jennison v. Kirk, 98 U.S. 453 (1879).

As the western states were admitted to the Union, the various admissions acts declared the power of the states to exert their sovereignty over waters within the state and to administer the water rights already vested. Oregon v. Corvallis Land and Gravel Co., 429 U.S. 363 (1977); Montana v. United States, 450 U.S. 544 (1981).

In United States v. New Mexico, supra, the United States claimed that it had the authority, as the federal government, "to allocate water to certain private users--in this case, cattle ranchers--outside the structure of state water law." 438 U.S. at 717, note 24. But, this Court rejected that contention, finding no base in federal law for such contention.

The Court could find "no indication in the legislative histories of any of the forest acts that Congress foresaw any need for the Forest Service to allocate water for stockwatering purposes, a task to which state law was well suited." 438 U.S. 717 This Court agreed with the New Mexico courts that "stockwatering rights must be allocated under state law to individual stockwaterers." Id.

Here, as in United States v. New Mexico, there is no indication in the legislative histories of any of the Acts authorizing

withdrawal that Congress foresaw any need for its regulatory agencies "to allocate water for stockwatering purposes", and there certainly is no such provision in either the Pickett or Stock Raising Homestead Act.

There is no valid base for the Idaho Supreme Court's creation of a federal right to allocate and control use of stockwater rights. That Court simply made its statement of right out of whole cloth. It is a creation which is in direct conflict with federal statutory provisions and with decisions of this Court.

CONCLUSION

The economic livelihood of these Petitioner-ranchers is at stake. As this Court has recognized in a long series of cases involving water rights in the arid western states, the right to the use of water is the lifeline to survival. The very nature of the western ranching operation is dependent upon water rights which have vested from prior appropriation for a beneficial use. The beneficial use claimed by these Petitioners is the watering of livestock from the water sources identified in their claims. The United States can claim no such beneficial use since it does not now, and never has, own livestock which is dependent upon the stockwater at issue. The decision of the Idaho Supreme Court takes from these Petitioners water rights which they have acquired prior to this Adjudication process, gives those rights to a federal regulatory agency, and then gives that agency the right to allocate water use as it sees fit. As a result, the Idaho Supreme Court has placed in the hands of a federal regulatory agency the power and authority, the "right" to put these Petitioner-ranchers out of business by denying use of stockwater. Such result is inconsistent with all prior decisions issued by this Court regarding water rights in the western states, is inconsistent with all prior acts of Congress, and is certainly inconsistent with the provisions of the Idaho Constitution which were accepted and ratified by Congress in the Idaho Admission Act.

The Idaho Supreme Court has misconstrued and misapplied

federal law. Only this Court can correct the mistake, and prevent economic disaster which faces these Petitioners. The Petitioners request that this Court grant the Petition for writ of certiorari, or summarily reverse the Idaho Supreme Court's decision and remand the case for further consideration in light of the federal authorities cited herein.

Respectfully submitted,

Richard L. Harris
Attorney for Petitioners

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IN THE SUPREME COURT OF THE STATE OF IDAHO
Docket No. 23587

IN THE MATTER OF SRBA CASE NO. 39576 BASIN-WIDE ISSUE #9 (PWR 107) ENTERED DECEMBER 9, 1996.

UNITED STATES OF AMERICA,

Appellant,

v.

STATE OF IDAHO; J. R. SIMPLOT CO.; LEMHI IRRIGATION CO.; DAVE NELSON, LOLA COATES, SAN FELIPE RANCH; HARRY R. BASS; TED S. BLACKSTOCK; RICHARD BRANDAU; WILLIAM J. BROCKMAN; MICHAEL F. HANLEY, IV; JERRY L. HOAGLAND; THOMAS BALLMAN HOOK; TIM LOWRY; BILL LOWRY; PAUL NETTLETON; R. J. SMITH; WILEY F. SMITH; MITCHELL D. SORENSON; ROBERT THOMAS; YOUNG HARVEY WALKER,

Respondents.

Twin Falls, Nov. 1997 Term

1998 Opinion No. 41

Filed: April 6, 1998

Frederick C. Lyon, Clerk

Appeal from the District court of the Fifth Judicial District, State of Idaho. Hon. Daniel C. Hurlbutt, District Judge.

EQ 004 JOB 6623AB3-000-01 PAGE-002 BARBER
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Adjudication order denying a claim by the United States that it holds a reservation of water rights on federal land for stockwatering purposes, *reversed*.

Betty Richardson, United States Attorney, Boise; William B. Lazarus, Department of Justice, Washington, D.C.; Randall J. Bramer, Department of Justice, for appellant United States of America. William B. Lazarus argued.

Hon. Alan C. Lance, Idaho Attorney General; Clive Strong, Deputy Attorney General; David J. Barber, Deputy Attorney General, Boise, for respondent State of Idaho. David J. Barber argued.

Terry T. Uhling and Shawn D. Ysursa, Boise, for respondent J.R. Simplot, Co. Shawn D. Ysursa argued.

WALTERS, Justice.

This appeal raises a question of federal law within the Snake River Basin Adjudication (SRBA), a suit in the district court for the general adjudication of water rights in the Snake River water basin. The dispute in the instant action concerns a claim by the United States that it has a federal reserved water right for all springs and waterholes which are located on lands withdrawn from the public domain. The claim is predicated upon an executive order issued in 1926, entitled Public Water Reserve No. 107 (PWR 107). The SRBA court held that PWR 107 did not create a valid basis for a federal reserved water right, and the United States has appealed. We conclude that PWR 107 provides a valid reservation of water rights by

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the federal government for the limited purpose of stock-watering by permittees under the Taylor Grazing Act and, accordingly, reverse the order of the SRBA court.

I.

FACTS AND PROCEDURAL BACKGROUND

The United States filed over 11,000 claims in the SRBA asserting a reserved water right pertaining to PWR 107. On November 5, 1995, one of the parties to the adjudication filed a motion to designate the alleged reserved right under PWR 107 as a basin-wide issue. On March 8, 1996, the SRBA district court entered an order granting the motion. The order designated the question: "Whether Public Water Reserve 107 is a valid basis for a federal reserved water right?" as Basin Wide Issue No. 9.

Following briefing and argument, the SRBA court entered its decision and order on December 9, 1996. The court determined that PWR 107 was issued to prevent the control of adjacent land through monopolization of water sources by individual homesteaders who are allowed to settle on the public domain. The court further held that the purpose of PWR 107 was to reserve the land immediately surrounding springs and waterholes to ensure that water would remain available for public use and appropriation, but that PWR 107 did not expressly or impliedly reserve water or appropriate water for use by the United States. In addition, the SRBA court essentially concluded that if there was an implied reservation of the right to water in order to carry out the purposes of PWR 107, that right no longer existed as a result of the enactment by Congress in 1976 of the Federal Land Policy and

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Management Act (FLPMA). Therefore, the SRBA court concluded that PWR 107 was not a valid basis for a federal reserved water right in the SRBA. The decision was certified as final under Idaho Rule of Civil Procedure 54(b), allowing the United States to pursue this appeal.

II.

PWR 107 AS A BASIS FOR A FEDERAL RESERVED WATER RIGHT.

A. Federal Reserved Water Rights in General.

The federal reserved water rights doctrine arises from the decision of the United States Supreme Court decision in *Winters v. United States*, 207 U.S. 564 (1908). In *Winters*, the Court held that when Congress established an Indian reservation, it also, by implication, reserved the water rights necessary to achieve the reservation's purpose. In a later case, the Court explained:

> [W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce Clause, Art. I § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian

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> reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.

Cappaert v. United States, 426 U.S. 128, 138 (1976). The doctrine of reserved water rights has been extended to include public lands reserved for a particular governmental purpose, such as the creation of parks, wildlife refuges, and national forests.

The reserved right is not without limitation, however. The Court in *Cappaert* also advised that "[t]he implied-reservation-of-water-rights doctrine . . . reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert*, 426 U.S. at 141 (citing *Arizona v. California*, 373 U.S. 546, 600-01 (1963)). Furthermore, if "water is only valuable for secondary use of the reservation . . . there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator." *United States v. New Mexico*, 438 U.S. 696, 702 (1978). The necessity of water must be so great that without the water the reservation would be "entirely defeated." *Id.* at 700. Therefore, where a reservation of public land for a particular purpose does not expressly declare that water is needed as a primary use to accomplish the purpose of the reservation, or the exact purpose of the reservation is not clearly set forth in terms readily demonstrating the necessity for the use of water, the courts must consider the relevant acts, enabling legislation and history surrounding the particular reservation under review to determine if a federal reserved water right exists.

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B. **Public Water Reserve 107.**

We thus turn to an examination of PWR 107, together with its enabling legislation and the circumstances and history surrounding its creation, to determine whether a federal reserved water right exists in the present case. In 1926, President Calvin Coolidge signed the executive order entitled "Public Water Reserve No. 107." PWR 107 provides:

> [I]t is hereby ordered that every smallest legal subdivision of public land surveys which is vacant, unappropriated, unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land, be and the same is hereby withdrawn from settlement, location, sale or entry, and reserved for public use in accordance with the provisions of Section 10 of the Act of December 29, 1916.

The authority for withdrawals under PWR 107 is provided in the December 29, 1916, statute known as the Stock Raising Homestead Act (SRHA) and in the Pickett Act of 1910.[1] The first piece of enabling legislation for PWR 107 was the withdrawal provision of the Pickett Act, which was incorporated by reference in the SRHA of 1916. The Pickett Act, 43 U.S.C. § 141, provided:

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[1] Sections 300 and 141 of the SRHA and the Pickett Act, respectively, were repealed by the Federal Land Management Act (FLPMA), Pub.L. 94-579, 905 [sic] Stat. 2744 [sic] (1976) (codified at 43 U.S.C. §§ 1701 *et seq. (1986)*). However, the FLPMA provided that all withdrawals in force on the date of enactment of FLPMA shall remain in force until specifically changed in accordance with FLPMA.

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> [T]he President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including the District of Alaska, and reserve the same for waterpower sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

In short, the Pickett Act of 1910 provided the President with the broad discretion to temporarily withdraw lands and reserve such lands for public purposes. Subsequently, Congress enacted the SRHA of 1916, which authorized the President to reserve lands containing waterholes or other bodies of water needed or used by the public for watering purposes, and delegated the management of such lands to the Secretary of the Interior. Section 10 of the SRHA of 1916, 43 U.S.C. § 300, states:

> [L]ands containing water holes or other bodies of water needed or used by the public for watering purposes shall not be designated under this Act but may be reserved under the provisions of [the Pickett] Act of June twenty-fifth, nineteen hundred and ten, and such lands heretofore or hereafter reserved shall, while so reserved, be kept and held open to the public use for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe.

The Committee Report on the SRHA of 1916 noted:

> This is a new section and authorizes the Secretary of the Interior to withdraw from entry and hold open for the general use of the public,

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> important water holes, springs, and other bodies of water that are necessary for large surrounding tracts of country, so that *a person cannot monopolize or control a large territory by locating as a homestead the only available water supply for stock in that vicinity.* [Emphasis in original.]

H.R.Rep. No. 35, 64th Cong., 1st Sess. 18 (1916), *quoted in United States v. City and County of Denver*, 656 P.2d 1, 31 n. 48 (Colo.1982).

Following adoption of the SRHA of 1916, the Secretary of the Interior prepared PWR 107 as a proposed executive order for the President. The order was transmitted to President Coolidge by the Secretary on April 17, 1926, together with a letter stressing to the President the need to prevent the monopolization of public grazing lands by private individuals controlling the water. The Secretary's letter recited:

> The control of water in the semi-arid regions of the west means the control of the surrounding grazing areas, possibly in some regions millions of acres, and in view of the pending bill to authorize the leasing of grazing lands upon the unreserved public domain, it is believed important to retain the title to and supervision of such spring and water holes on the unreserved public domain as have not already been appropriated.[2] [Footnote added.]

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[2] The Secretary's acknowledgement of pending legislation which would allow grazing leases on unreserved land in the public domain was in reference to what later became known as the Taylor Grazing Act. 43 U.S.C. §§ 315 *et seq.* (1934).

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On the same day, April 17, 1926, President Coolidge issued PWR 107 withdrawing all unreserved public land containing a spring or waterhole as stated.

After considering the plain and ordinary words of the enabling statutes and executive order underlying PWR 107, we conclude that PWR 107 evidences an express intention by Congress that reserves a water right in the United States.

C. **Nature of Reserved Right.**

In the present case, the United States has limited its claim for a reserved water right to stock water consumption. The United States asserts that the purpose of PWR 107 is to reserve water for public use and appropriation as a source for permittees under the Taylor Grazing Act. The United States persuasively argues that such a reservation of stock water is needed in order to ensure the perpetual use of the water for stockwatering purposes by whichever member of the public happens at any time to have the grazing permit for the lands containing the relevant springs and waterholes. The United States further points out that if the water is available for private appropriation, then individuals could monopolize the water rights for their permanent, exclusive use, thereby precluding stockwatering access to those holding grazing permits for those lands.

We agree with the United States and the observation by the Colorado Supreme Court that the purpose of PWR 107 includes a federal reserved water right and that the United States has the right to administer those water rights. Both the legislative history surrounding the SRHA

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of 1916 and the SRHA itself provided the Department of the Interior with the "authority to regulate public springs and water holes so that no person could monopolize or control vast areas of western land by homesteading the only available water supply." *United States v. City and County of Denver*, 656 P.d [sic] at 31. In addition, the letter from the Secretary of the Interior to the President, which was written in contemplation of the then pending Taylor Grazing Act of 1934, stated that the purpose of PWR 107 was to "retain the title to and supervision of such springs and water holes." These springs and waterholes, which are located on public lands, should be regulated, supervised and administered by the Department of Interior. To hold otherwise would be in contravention of the policy of this state "to secure the maximum use and benefit, and least wasteful use, of its water resources." *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960).

The purpose of PWR 107 was to prevent the monopolization by private individuals of springs and waterholes on public lands needed for stockwatering. Without the reserved water right for such springs and waterholes the purpose of PWR 107 would be entirely defeated because Taylor Grazing permittees would not have water needed for stockwatering purposes. Furthermore, the administration of the reserved water rights for consumption by grazing animals on land managed by the federal government may simplify the SRBA proceeding because the priority date for all of the Taylor Grazing rights would be the same date, April 17, 1926, which is the date of withdrawal pursuant to PWR 107.

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D. The Effect of FLPMA.

The United States argues also that the SRBA district court incorrectly concluded that the purpose of PWR 107 was abrogated by the passage of FLPMA in 1976. The United States contends that, instead, this Court should follow the decision of the Colorado court in *United States v. City and County of Denver, supra*, holding that the enactment of FLPMA had no effect on the reserved water rights created by PWR 107. 656 P.2d at 31, n. 47. We agree.

In 1976, with the enactment of FLPMA, Congress limited the authority for future withdrawals of land from the public domain by the Executive Branch. However, FLPMA provided a savings provision that stipulates: "All withdrawals, reservations, classifications, designations in effect as of the date of approval of this Act shall remain in full force and effect until modified under the provisions of this Act or other applicable law." 43 U.S.C. historical note § 1701.

In short, the FLPMA itself stipulated that withdrawals and reservations existing at the time of its enactment shall remain in effect. Therefore, PWR 107 reserving water rights in withdrawn land fifty years prior to the enactment of FLPMA, remains in full force and effect.

III.

CONCLUSION

We hold that PWR 107 is a valid basis for a federal reserved water right for the limited purpose of stockwatering. In addition, we conclude that the United States

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has the right to administer such water rights on the public lands managed under the Taylor Grazing Act. Furthermore, we conclude that the passage of FLPMA does not affect the PWR 107 withdrawals. Accordingly, the district court's order on Basin-Wide Issue No. 9 is reversed.

No costs are awarded on appeal.

Chief Justice TROUT, and Justices JOHNSON, SILAK and SCHROEDER, CONCUR.

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IN THE DISTRICT COURT OF THE
FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE
COUNTY OF TWIN FALLS

In Re SRBA	)	Case No. 91-00009
Case No. 39576	)	
	)	MEMORANDUM DECISION
	)	AND ORDER RE:
	)	BASIN-WIDE ISSUE 9

Daria Zane, United States Department of Justice, for the United States
David Barber, Deputy Attorney General, for the State of Idaho
Terry Uhling for J.R. Simplot
Wiley F. Smith, *Pro se*
Jerry L. Hoagland, *Pro se*
Young Harvey Walker, *Pro se*
William J. Brockman, *Pro se*

I. PROCEDURAL HISTORY

Basin-Wide Issue 9 was designated by the court on the motion of Mitchell D. Sorensen and Young Harvey Walker, appearing *pro se* (*Order Designating Basin-Wide Issue No. 9*, Mar. 8, 1996). The issue presented by Basin-Wide Issue 9 is:

> **Whether Public Water Reserve 107 is a valid basis for a federal reserved water right.**

Public Water Reserve (PWR) 107[1] withdraws from entry public lands which surround water sources in order to keep homesteaders from controlling large land tracts

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[1] Exhibit 19 attached hereto; *see* 43 C.F.R. § 292.1 (1938) (recodified at 29 F.R. 4302 Mar. 31, 1964. Section 292.1 was recodified as 2321.1-1(a)).

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by settling around the only water supply available for public use.

The position of the United States is that PWR 107 reserves that amount of water necessary to fulfill the purpose of the reservation. The State of Idaho (State), J.R. Simplot, Wiley Smith, Jerry Hoagland, Young Harvey Walker and William J. Brockman (collectively "the Opponents") contend that if PWR 107 reservations exist in Idaho, the reservations are of land and do not expressly or impliedly include water.

II. DECISION

Basin-Wide Issue 9 is resolved by determining whether PWR 107 creates either an express or implied reservation of water for use by the federal government. The first inquiry is whether PWR 107 creates an express reservation of water. To make this determination, the court is required to look at the plain and ordinary words of the enabling legislation and acts of the President creating the PWR 107 reservations. *Cappaert v. United States*, 426 U.S. 128 (1976); *Rim View Trout Company v. Higginson*, 121 Idaho 819, 822, 828 P.2d 848 (1992).

The authority to make PWR 107 reservations was derived from two acts of Congress, the Pickett Act of 1910 and the Stock Raising Homestead Act (SRHA) of 1916. The Pickett Act authorized the President to make withdrawals of land for public purposes as provided in Section One:

> That the President may at any time in his discretion, temporarily withdraw from settlement, location, sale or entry any of the public lands of

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> the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by Act of Congress.

Act of June 25, 1910, ch. 421, 36 Stat. 847, codified at 43 U.S.C. § 141 (1976).

Following the Pickett Act's grant of general authority to make land reservations, Congress adopted the SRHA to specifically address withdrawals of land in relation to homesteading. The purpose of the SRHA was to:

> Authorize[s] the Secretary of the Interior to withdraw from entry and hold open for the general use of the public, important water holes; springs, and other bodies of water that are necessary for large surrounding tracts of country; **so that a person can not monopolize or control a large territory by locating as a homestead the only available water supply for stock in that vicinity.**

H.R. Rep. No. 35, 64th Cong., 1st Sess. 18 (1916) (emphasis added).

To implement the general purposes of the SRHA, Section Ten provided:

> That lands containing water holes or other bodies of water needed or used by the public for watering purposes shall not be designated under this Act but may be reserved under the provisions of the [Pickett] Act of June twenty-fifth, nineteen hundred and ten, and such lands heretofore or hereafter reserved shall, while so

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> reserved, be kept and held open to the public use for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe.

Act of December 29, 1916, 39 Stat. 865, codified at 43 U.S.C. § 141 (1976).

On April 17, 1926 President Calvin Coolidge issued PWR 107 under his authority derived from the Pickett Act and the SRHA:

> [I]t is hereby ordered that every smallest legal subdivision of the public land survey which is vacant unappropriated unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land be, and the same is hereby, withdrawn from settlement, location, sale, or entry, and reserved for public use in accordance with the provisions of Sec. 10 of the act of December 29, 1916 (39 Stat. 862), and in aid of pending legislation.

Trial Exhibit 19 attached hereto; *see* 43 C.F.R. § 292.1 (1938) (recodified at 29 F.R. 4302 Mar. 31, 1964. Section 292.1 was recodified as 2321.1-1(a)).

The plain and ordinary words of the Pickett Act and the SRHA express the Congressional intent to ensure the implementation of its policy of promoting Western settlement by members of the public. Congress recognized that full settlement of Western lands would be prohibited where one homestead was strategically established to surround a water source of sufficient quantity to be used for the benefit of additional potential homesteads nearby. Such strategically placed homesteads would then be able

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to control the water source and prevent homesteading on large areas of land. This occurrence would be contrary to federal settlement policy which sought to maximize Western land use.

PWR 107 was issued to prevent control of water sources by individual homesteaders and subsequent control of adjacent land. Its express purpose was to reserve the land immediately surrounding water sources to ensure that water would remain available for public use and appropriation. PWR 107 was not an express appropriation of water for use by the United States government.[2] The express intention of PWR 107 was to protect the availability of water sources for settlement or homesteading by members of the public who could take public land and put it to private use. Concomitantly, the homesteaders would appropriate the water so protected and place it to private use. In this manner, PWR 107 advanced federal settlement policy. The use of the water in protected sources by the federal government was neither contemplated by Congress nor was it necessary to carry out the express purpose of PWR 107 reservations.

The next inquiry is whether PWR 107 land withdrawals include implied reservations of water for use by the federal government. An implied reservation exits [sic] when water is "needed to accomplish the purpose of the reservation." *United States v. New Mexico*, 438 U.S. 696, 699-700 (1978) (citing *Cappaert v. United States*, 426 U.S. 128 (1976)). The necessity to support a federal reservation

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[2] *See also, United States v. City and County of Denver*, 656 P.2d 1 (Colo. 1980) (PWR 107 does not expressly state an intention to reserve water in public springs or water holes).

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must be such that without water the purpose of the land reservation would be "entirely defeated." *Id.* at 700. Federal reservations can only reserve an "amount of water necessary to fulfill the purpose of the reservation, no more." *Id.*

The United States' position is that without a water reservation, it is still possible for an individual to control the entirety of a water supply thereby defeating the purpose of the reservation. This court disagrees. The view that, but for a federal reservation, water on public land may be monopolized assumes no sovereign entity controls or regulates the appropriation of water from that source. This assumption fails because the United States Supreme Court has ruled that the state both controls and regulates that appropriation of all nonnavigable water within its borders.

> **What we hold is that following the act of 1877, if not before, all nonnavigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states, including those since created out of the territories named,** with the right in each to determine for itself to what extent the rule of appropriation or common-law rule in respect of riparian rights should obtain. For since 'Congress cannot enforce either rule upon any state,' the full power of choice must remain with the state.

California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163-164 (1935) (citation omitted) (emphasis added); *see also*, I.C. § 42-101; *California v. United States*,

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438 U.S. 696 [sic] (1978); *United States v. New Mexico; Cappaert v United States.*[3]

The United States' position that PWR 107 impliedly reserves water is contrary to law and would effectively shift control over the appropriation of nonnavigable waters from the state to the federal government. Accepting that PWR 107 impliedly reserved water in addition to expressly reserving land would constitute a complete reallocation of federal and state sovereignty with respect to the appropriation of nonnavigable waters. It would be a feat of legal gymnastics to read the Pickett Act and the SRHA as a Congressional declaration for the federal takeover of state sovereignty over the appropriation of its nonnavigable waters. The practical effect of the United States' position would be to remove water within PWR 107 reserves from appropriation under state law. Water within a PWR 107 reserve would then be allocated by the United States. This has been the position of the Interior Solicitor.

> After the [1926] withdrawal, therefore, a party desiring to use the water either on or off the reservation would be required to obtain permission to do so from the United States through some form of permit. **The permitting process**

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[3] This state's control extends to water sources located on the public domain. *See e.g., Lemmon v. Hardy*, 95 Idaho 778, 780, 519 P.2d 1168 (1974) ("The rule as to trespass and water rights in Idaho appears to be that a water right initiated on the unsurveyed public domain is valid, but a water right initiated by trespass on private property in invalid."); *Short v. Prasiewater*, [sic] 35 Idaho 691, 208 P.2d [sic] 844 (1922) and *Keiler v. McDonald*, 37 Idaho 573, 218 P. 365 (1923) (Spring water situated wholly on public land is subject to appropriation).

> **allowed the United States to determine that the proposed use was in the public interest and not in derogation of the purpose of the reservation.**

86 Interior Dec. 580, 581 (Dept. of Interior 1979) (emphasis added).[4]

Implicit to the Interior Solicitor's opinion is the erroneous assumption that absent a reservation, the public interest in water sources falling within PWR 107 reservations receives no sovereign protection. This assumption is contrary to well-established law. The Idaho Supreme Court explicitly set forth the state's duty to oversee the public interest in water rights:

> 'All the water of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose. . . . ' I.C. § 42-101. This expressed policy of the legislature is in harmony with Idaho Const. art. 15, § 1. Such interest or title is not 'in the proprietary sense, but rather in the sovereign capacity as representative of all the people for

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[4] The opinion of the Interior Solicitor in 1979 is directly contrary to an opinion rendered by the Assistant Secretary of the Interior in 1916 which was issued contemporaneously with the SRHA. In that opinion, the Assistant Secretary commented that water contained in a land reservation could be appropriated under state law. 45 Pub.Lands Dec. 551, 554(1916). This statement recognizes traditional western water law in which the states are accorded control of the appropriation of nonnavigable waters.

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> the purpose of guaranteeing that the common rights of all shall be equally protected and that no one shall be denied his proper use and benefit of this common necessity.'

Poole v. Olaveson, 82 Idaho 496, 502, 356 P.2d 61 (1960) (citations omitted); *see also*, I.C. § 42-101.

The "public interest" is a broad concept encompassing a wide range of concerns. As identified by the Idaho Supreme Court one such concern is the recognition by the State of Idaho that water is a "common necessity" which needs to be protected for all people. In other words, the State of Idaho has acknowledged the importance of preventing the monopolization of water. Therefore, as to private rights to the use of water, it is the state, not the federal government, that determines whether or not a particular use serves the public interest. To find otherwise would create dual systems for the appropriation and management of water and contravene the long-established and well-settled law governing th : appropriation of nonnavigable waters.

In conjunction with the law establishing state plenary control of nonnavigable water sources, the federal government may obtain reserved rights when, and only when, the reservation serves some *federal* purpose. *United States v. New Mexico*, 428 U.S. at 700. However, implied reservations cannot be found where the reservation is intended to benefit only those individuals operating on the public lands for their own private purpose. Professor Getches makes the clearest statement of this principle:

> Persons using the public lands for private purposes do not exercise reserved water rights and must perfect water rights in accordance with

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> applicable state law. Reserved rights can arise only when public land is reserved – withdrawn from entry and dedicated to a specific federal purpose – and may be exercised by private individuals only when they are engaged in activity that fulfills the federal purpose. **Consequently it is necessary to distinguish between those who use "open" public lands for their own purposes and those who function on reserved lands primarily to carry out the federal purposes of the reservation. . . .**
>
> **Ordinarily lessees and permittees use public or Indian lands for their own purposes and must establish their own water rights under state (or tribal) law.**

DAVID H. GETCHES, WATER LAW 326-327 (2nd ed. 1990) (emphasis added).

In this case, the land containing certain water sources was reserved under PWR 107 so that other homesteaders or stockmen could use the water located within the reservation. *See infra*, H.R. Rep. No. 36, 64th Cong., 1st Sess 18 (1916). Presumably, none of these users would be using the water for any *public* purpose. Rather, those using water located within a PWR 107 reserve would be doing so for their own *private* purpose. The private use of water within a PWR 107 land reserve does not further a specific federal purpose as is typical of reservations where water use itself furthers a defined federal purpose.

Further, it now appears that the purpose of PWR 107 reservations was abrogated by the passage of the Federal Land Policy and Management Act (FLPMA) of 1976, Pub.L. 94-579, 90 Stat. 2743, codified at 43 U.S.C.A. § 1701, *et seq.* (1986). Under FLPMA, Congress declared

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that "the public lands be retained in federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest." *Id.* While FLPMA did not repeal reservations or withdrawals that existed prior to its passage (*see*, Savings Provision § 701 of Pub.L. 94-579, found at 43 U.S.C.A. § 1701n.(c) (1986)), its adoption has significance as it relates to the required necessity in order to find an implied reservation of water under PWR 107.

With the passage of FLPMA, Congress repealed nearly all land disposal laws including those relating to homesteading. *See*, 43 U.S.C.A. § 161, *et seq.* (1986), repealed by Pub.L. 94-579, Title VII, § 702, October 21, 1976, 90 Stat. 2787. Consequently, the specific concern with homesteaders strategically homsteading [sic] around water sources thereby monopolizing large tracts of land has vanished and with it the policy issue underlying the United States' claim of necessity for a reservation of water under PWR 107. This opinion is shared by some within the Bureau of Land Management.

> The original intent of Public Water Reserve withdrawals was to protect selected parcels of public land which contained sufficient water to provide for public use. With the passage of FLPMA, laws relating to land disposal have been repealed to the extent it is no longer necessary to protect undeveloped parcels of public land for the above-stated purpose.

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Memorandum to State Director from District Manager, Boise District, dated May 13, 1980.[5]

Implied reservations exist only so long as necessary to serve the purpose of the reservation. *See, e.g., In Re Big Horn Adjudication*, 899 P.2d 848, 854 (1995).[6] Where the necessity for the reservation no longer exists, the implied reservation terminates. Implied reservations should not continue for eternity to serve an interest that no longer exists.

In analyzing PWR 107 reserves, both this court and the Colorado Supreme Court rely on the factors set forth in *Cappaert v. United States* and *United States v. New Mexico*. However, the Colorado Supreme Court found that PWR 107 reservations contain an implied reservation of water "minimally" necessary to serve the purpose of the reservation. *United States v. City and County of Denver*, 656 P.2d 1, 32 (Colo. 1980). While agreeing with its analysis, this court respectfully disagrees with the Colorado court's conclusion. The Colorado court determined that the purpose of the reservation was to provide "watering supply for animal and human consumption." *Id.* at 31.

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[5] *See contra*, pre-FLPMA Interior Decision, *Jack A. Medd*, 60 Interior Dec. 83, 96 (Dept. of Interior 1947).

[6] *In Re Big Horn Adjudication* involved a case in which certain Tribes ceded their land to the United States for sale. The Wyoming Supreme Court held as follows: "[T]he reserved water right disappeared because the purpose for which it was recognized no longer pertained. That purpose no longer existed for lands acquired by others after they had been ceded to the United States for disposition. The effect is that the reserved water rights were eliminated as to those tracts." *In Re Big Horn Adjudication*, 899 P.2d at 854.

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Such a purpose does not give rise to an implied reservation of water by the federal government for its use. Where water within a reservation is to be used by private individuals for private purposes, those private users must obtain a water right under state law. In light of the private purpose of the use of the water, the Colorado Supreme Court did not consider the effect of the purported reservation of water on the well-established principles of Western water law regarding the states' plenary control over the appropriation of nonnavigable waters. Finally, while the Colorado court discussed FLPMA, it did not consider FLPMA's effect on the necessity of the reservation.

In conclusion, it is held that implied reservations of water were never necessary to serve PWR 107 land withdrawals. The express purpose of a PWR 107 reservation was to prevent the monopolization of land. So long as the United States may reserve land surrounding water sources, the purpose of the reservation is served. The purpose of the reservation is not "entirely defeated" without water. No federal purpose would be served by an implied reservation of water. Consequently, this court does not find an implied reservation.

Consistent with the reasons stated above, the court finds that PWR 107 does not contain either an express or implied reservation of water.[7]

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[7] The Opponents also argue that PWR 107 reservations do not constitute "blanket" withdrawals. With the determination that PWR 107 reservations do not include water, there is no need to address the issue of "blanket" withdrawals.

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IT IS SO ORDERED.

DATED December 9, 1996.

/s/ Daniel C. Hurlbutt, Jr.
DANIEL C. HURLBUTT, JR.
Presiding Judge
Snake River Basin Adjudication

Exhibit 19

Public Water Reserve No. 107

[Handwriting (Illegible)]

ORDER OF WITHDRAWAL

PUBLIC WATER RESERVE NO. 107

Under and pursuant to the provisions of the act of Congress approved June 25, 1910 (36 Stat., 847), entitled "An act to authorize the President of the United States to make withdrawals of public lands in certain cases", as amended by act of Congress approved August 24, 1912 (37 Stat., 497), it is hereby ordered that every smallest legal subdivision of the public land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land be, and the same is hereby, withdrawn from settlement, location, sale, or entry, and reserved for public use in accordance with the provisions

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of Sec. 10 of the act of December 29, 1916 (39 Stat., 862), and in aid of pending legislation.

(Sgd) CALVIN COOLIDGE
President

April 17, 1926

Two carbons to General Land Office

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER RE: BASIN-WIDE ISSUE 9 was mailed on December 9, 1996, with sufficient first-class postage to the following:

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P. O. Box 44449
Boise, ID 83711-4449

The United States Department of Justice
Environment and Natural Resources Division
550 West Fort Street, MSC 033
Boise, ID 83724

Idaho Department of Water Resources
P. O. Box 83720
Boise, ID 83720-0098

Court Certificate of Mailing for Basin-Wide Issue 9

/s/ Illegible
Deputy Clerk

BEST AVAILABL

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In the Supreme Court of the State of Idaho

IN THE MATTER OF SRBA CASE NO. 39576 BASIN-WIDE ISSUE #9 (PWR 107) ENTERED DECEMBER 9, 1996.

UNITED STATES OF AMERICA,

Appellant,

v.

STATE OF IDAHO; J.R. SIMPLOT CO.; LEMHI IRRIGATION CO.; DAVE NELSON, LOLA COATES, SAN FELIPE RANCH; HARRY R. BASS; TED S. BLACKSTOCK; RICHARD BRANDAU; WILLIAM J. BROCKMAN; MICHAEL F. HANLEY, IV; JERRY L. HOAGLAND; THOMAS BALLMAN HOOK; TIM LOWRY; BILL LOWRY; PAUL NETTLETON; R.J. SMITH; WILEY F. SMITH; MITCHELL D. SORENSON; ROBERT THOMAS; YOUNG HARVEY WALKER,

Respondents.

AMENDED ORDER DENYING RESPONDENT JERRY HOAGLAND'S PETITION FOR REHEARING

NO. 23587
Ref. No. 98RH-12

To: David

ATTENTION: It is the attorney's responsibility to carefully give the final proofreading of these proofs. Any later changes, after printing, will be charged to the attorney.

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Respondent, Jerry Hoagland, having filed a PETITION FOR REHEARING on April 27, 1998 and a supporting BRIEF on May 11, 1998, seeking review of the Opinion of the Supreme Court filed April 6, 1998; therefore, after due consideration,

IT IS HEREBY ORDERED that Respondent, Jerry Hoagland's PETITION FOR REHEARING be, and hereby is, DENIED.

DATED this 15th day of October, 1998, nunc pro tunc July 29, 1998.

By Order of the Supreme Court

/s/ Frederick C. Lyon
Frederick C. Lyon, Clerk

cc: Counsel of Record
District Court Clerk
District Court Judge Daniel C. Hurlbutt